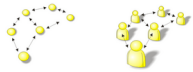
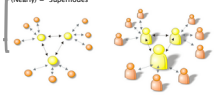
Class 22: Third-Party Liability

- Administrative
  - Next Time: 593-98 (Skip notes following) and handouts and website linked to on class website
  - Review Class
  - Youtube Monday
- Last Time
  - Recap Cases
    - Harper & Row
      - 1. Purpose and Character of Use
        - Purpose: News Reporting
          - D went beyond simply reporting the news
          - Neutral or For P
        - Purpose: Commercial — For P
      - 2. Nature of the Copyrighted Work
        - Factual, Historical Autobiography
          - D pulled more than the facts, took subjective expression
          - Neutral or For P
        - Unpublished — For P
      - 3. Amount and Substantiality of Portion Used — Insubstantial portion, but the heart of the book — For P
      - 4. Effect on the Market — Actual effect on market for first printing rights shown — For P
      - Held: NO fair use.
    - Sony
      - 1. Purpose and Character of Use
        - Plainly noncommercial and non-profit
        - For D
      - 2. Nature of the copyrighted work. — Doesn't really say.
      - 3. Amount and substantiality of portion used.
        - Took entire shows.
        - For P — But these shows were already available for free.
      - 4. Effect on the Market
        - No showing that noncommercial time shifting will affect market for the works.
        - For D
      - Held: Fair Use
    - Acuff-Rose
      - 1. Purpose and Character of Use
        - Parody — For D
        - Commercial — For P
        - For P
      - 2. Nature of the copyrighted work.
        - Creative song — But parodies always copy fictional works.
        - Helps neither party.
      - 3. Amount and substantiality of portion used.
        - Heart taken — But parodies have to take the heart.
        - BUT: sometimes context will show that the parodist took too much. Begins to become a market substitute
        - Remand to determine if D took too much (for music only; lyrics were fine.)
      - 4. Effect on the Market
        - No harm to market for the original.
        - But possible harm for rap derivatives
        - Remand to determine harm to market for rap derivatives
      - Held: Reversed finding of "no Fair Use" and remand for further findings
  - Photocopying
    - American Geophysical v. Texaco
      - Basic Facts
        - 83 Publishers of scientific journals sue Texaco for copyright infringement of articles by photocopying.
        - Texaco's 400-500 scientists — Odd Procedural approach: Pick one lucky scientist at random (Chickering) and dig through his files.
        - Texaco routes journals to scientists with an interest.
        - Chickering photocopied eight files on own or with other employees' assistance.
          - Facilitate current or future professional research.
          - No immediate use -- placed in his files.
      - Held
      - Reasoning
        - 1. Purpose and character of use.
          - Primary Purpose
          - Other potential purposes
          - Commercial Use?
          - Transformative Use?
          - Dissent
        - 2. Nature of Copyrighted Work
        - 3. Amount and Substantiality of Portion Used
        - 4. Effect upon potential market or value.
          - What market?
          - The circularity problem.
          - Dissent
    - Other questions
- Third-Party Liability
  - Basic Doctrine
    - Origin: Not in the Copyright Statute
      - Borrows from general principles of Tort Law
      - Also borrows from Patent Act
    - Respondeat Superior — Employers liable for infringing acts of their employees under traditional master/servant principles.
    - Vicarious Liability
      - Two requirements
        - Right and ability to supervise — Even without knowledge of infringing acts
        - Direct financial interest in the infringement.
        - Role of Landlords
          - Leased office space: no liability.
          - Leased flea market stand: liability.
      - Example: Dance halls are liable.
    - Contributory Infringement
      - Induces, causes, or materially contributes to the infringement — WITH KNOWLEDGE of infringement
      - Example: Coin-operated "make-a-tape" system. in electronic store.
  - Sony
    - Basic Facts
      - Discussed Last Time
      - Issue presented: When is the creator of a technology liable for the infringing acts of the purchasers/users of that technology?
    - Held
    - Reasoning — Noninfringing uses
  - Substantial Noninfringing uses
- Grokster Inducement Liability
  - P2P Network Technology Primer
    - Centralized Servers
      - FTP Sites of early 1990's
      -
      - Images courtesy of http://www.vs.uni-kassel.de/systems/index.php/Architectural_Model
    - Pure p2p
      - 
    - Centralized-p2p Hybrids
      - Napster — Centralized Indexing Servers
      -
    - (Nearly) Fully decentralized p2p
      - Grokster
      - (Nearly) = "Supernodes"
      - 
  - Grokster v. MGM
    - Basic Facts
      - Over 100 million copies of software distributed — "The probable scope of copyright infringement is staggering"
      - Evidence of Intent
        - Streamcast — Targeted Napster's orphans
          - Internal e-mails admitting intent.
          - Press kit about attempt to capture Napster users.
          - "Bridge" application OpenNap
          - Banner Ads for OpenNap
          - Proposed Ads — Not clear whether they were released.
        - Grokster — "Sparser, but revealing"
          - Snaptor "Bridge"
          - Used metatags
          - Their name
      - Non-Infringing Uses
    - Held
    - Reasoning
    - Advice for next big thing?